In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1319

UNITED STATES OF AMERICA, PETITIONER

v.

UMBERTO JOSE CHAVEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-11a) is not yet reported. The opinion of the district court (A. 99-106) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1973 (Pet. App. B). The petition for a writ of certiorari was filed on March 29, 1973 and was granted on May 21, 1973 (A. 107). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether suppression of probative evidence is the appropriate or necessary way of dealing with any former inconsistencies between the Justice Department's internal review of proposed wire interception

applications, before their submission to a federal judge, and the procedures outlined for this purpose by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, when these procedures had no bearing on the judge's determination of probable cause and necessity and were, in any event, revised more than a year ago.

2. Whether, in a case where the Attorney General personally authorized the submission of the first of two wire interception applications to the district court, and his Executive Assistant exercised delegated authority to approve the second application, the procedures followed by the Department of Justice in authorizing the applications and identifying the officer authorizing them complied with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to our brief in *United States* v. *Giordano*, No. 72-1057.

STATEMENT

1. Respondents were charged with a conspiracy involving the importation of heroin into the United States in violation of 21 U.S.C. (1964 ed.) 173 and 174. Additionally, respondent Chavez was charged with using a telephone in interstate commerce to promote an unlawful narcotics business in violation of 18 U.S.C. 1952, and respondent Fernandez was charged with traveling in foreign commerce with the same purpose, also in violation of 18 U.S.C. 1952. Prior to trial, the government notified the defendants that it intended to use at trial evidence obtained from wire interceptions and pen registers[1] conducted under court orders of

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[1] A pen register is a device used to record the telephone numbers of outgoing telephone calls.

February 18, 1971, and February 25, 1971, which had been issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520).

The earlier order authorized interceptions of a telephone listed under the name of defendant Chavez and the later order authorized interception of one listed under the name of defendant Fernandez. The orders specified that the interceptions were to continue for a period not to exceed twenty days from the date of the order; both were terminated on February 27, 1971.

The defendants filed various motions to suppress, including motions challenging the procedure under which the applications for those orders had been authorized within the Department of Justice (A. 68-80). The government opposed these motions and filed affidavits (similar to those filed in *United States* v. *Giordano*, No. 72-1057) describing the procedure followed.[2]

The first interception request, leading to the February 18 wiretap of the Chavez telephone, was personally approved by the then Attorney General, John N. Mitchell, for submission to the district court (A. 93).[3]

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[2] Affidavits of former Attorney General John N. Mitchell; Sol Lindenbaum, Executive Assistant to the Attorney General; Henry E. Petersen, Assistant Attorney General, Criminal Division (formerly Deputy Assistant Attorney General); and Harold Shapiro, Deputy Assistant Attorney General, Criminal Division, were filed. The procedures followed and the delegation to Mr. Lindenbaum of authority to act for the Attorney General are described in detail at pp. 4-9 of our brief in *Gioradano, supra.*

[3] The file contained the proposed supporting affidavit (A. 13-38) which showed that Umberto Chavez had been the subject of a narcotics investigation for some time and had several prior

The second request—the application for the February 25 interception order involving the Fernandez telephone—was made when the Attorney General was not available and was authorized by the Executive Assistant to the Attorney General, Sol Lindenbaum, who had been authorized by the Attorney General to act for him in these situations and concluded from his knowledge of the Attorney General's actions in previous cases that the latter would have approved the request (A. 82).[4]

In both instances, after approval in the Attorney General's office, a memorandum was sent to the Assistant Attorney General in charge of the Criminal Division, Will Wilson, informing him of the approval and designating him to authorize the trial attorney in the field to submit the application to the district court

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narcotics convictions (A. 15-16). Information from a confidential informant showed that Chavez told the informant that he regularly received 120 ounces of high grade heroin at three week intervals, adulterated it, packaged it in unlubricated rubber prophylactics and distributed it throughout northern California (A. 18-19). Another confidential informant said that he had purchased heroin in such packages from Chavez on more than 100 occasions, by telephoning Chavez at his residence (A. 19-20). The information furnished by the informants was corroborated by the fact that Chavez regularly purchased unusually large quantities of prophylactics from pharmacies (A. 17-18).

[4] The affidavit in support of the application for the second wiretap order (A. 52-57) recited in detail the results of the interception of the Chavez telephone. Numerous telephone calls involving discussions of narcotics transactions in code had been intercepted, including calls to respondent Fernandez's number which indicated that he was deeply involved in the distribution of narcotics (A. 55-56). Several calls involved instructions concerning the time, method of delivery and sale of narcotics. In one call arrangements were made for an exchange of money at a local dump as part of a narcotics transaction. Chavez met Fernandez at the dump, and Fernandez then went to the Oakland, California, airport where he boarded a plane for San Diego (A. 56a).

(A. 83-84). Letters were then sent to the trial attorney over Assistant Attorney General Will Wilson's signature (which was affixed pursuant to his standing directions by a Deputy Assistant Attorney General (A. 85-92)) advising the trial attorney that he was authorized to file a wire interception application in the district court (A. 11-12, 50-51). The applications filed in court stated that the Attorney General

> has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant [Justice Department trial attorney] to make this application for an Order authorizing the interception of wire communications [A. 6-7, 45].

Thereafter, the court found that the accompanying affidavit established the requisite probable cause and necessity and issued wire interception orders, which specified that the application had been authorized by Assistant Attorney General Wilson, "who has been specially designated in this proceeding by the Attorney General * * * to exercise the powers conferred on the Attorney General by Section 2516 of Title 18 * * *" (A. 40, 59-60).

After a hearing, the district court suppressed the wiretap evidence and its fruits. It found that the application and order for the first wiretap did not properly identify the officer authorizing the application, and that the application for the second order, which had been passed upon by the Attorney General's Executive Assistant, had not been properly authorized.

On the government's appeal, the court of appeals affirmed. It ruled with respect to the first interception —the Chavez tap—which had been approved by the then

Attorney General, that while it was properly authorized under Section 2516(1), it was legally defective because the application for the order and the order itself misidentified the officer who had authorized the application, and thus violated Section 2518(1)(a) and (4)(d). It found that the purpose of that section was to fix responsibility in "only a few specially identified and publicly responsible officials," and that the form of application for the orders in this case "has the defect of obscuring from public view the identity of the persons making the decision and the factors which influenced their formulation of policy" (Pet. App. A, p. 9a). Moreover, the court was concerned, as was the Fourth Circuit in *Giordano*, with the possibility that the procedure would permit future Attorneys General to disavow the actions of their subordinates (Pet. App. A, pp. 9a-10a). It concluded that suppression was therefore necessary.

With respect to the second interception order—the Fernandez tap—the court of appeals relied on its prior decision in *United States* v. *King*, petition for a writ of certiorari pending, No. 72-1320, which agreed with the reasoning of the Fourth Circuit in *Giordano*, *supra*, and held that Section 2516(1) did not permit the Attorney General to delegate to his Executive Assistant the authority to approve applications on his behalf, even when the Attorney General was not personally available.

SUMMARY OF ARGUMENT

The facts and issues in the present case are similar to those in *United States* v. *Giordano*, No. 72-1057, and we rely here on Parts I and II of our Summary of Argument in our brief in that case, pp. 20-24.[5]

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[5] We are furnishing counsel for respondents with copies of our *Giordano* brief.

ARGUMENT

For the two major questions in this case, we rely primarily on the arguments in our brief in the *Giordano* case. We there contend that no reason of constitutional law, statutory interpretation, or public policy would justify suppression of reliable evidence secured with full regard for the individual's right of privacy after a federal judge has made a valid finding of probable cause and necessity. In addition, we also contend that the preliminary processing procedures for these applications—which were changed more than a year ago—complied with Title III.

Indeed, the suppression of the fruits of the first order in the present case illustrates the harshness of the application of the exclusionary rule. The first order was based on a finding of probable cause by a district court on an application which had been personally authorized within the Department of Justice by the Attorney General himself. The court below ordered the fruits suppressed because the letter sent to the field attorney notifying him that he was authorized to apply for court approval of a wiretap inaccurately indicated that the authorization represented the decision of an Assistant Attorney General when it actually was the personal decision of the Attorney General. To say, as did the court below, that this was "deliberate deception of the courts by the highest law officers in the land" (Pet. App. A, p. 10a) is not only completely unfounded but also ignores the crucial facts that this identification was immaterial to the determination of probable cause and necessity the district court was called upon to make, and immaterial to the right of the persons potentially subject to the court order that there be no unwarranted invasions of their privacy. Those personal rights were

fully protected by the screening of the application that actually took place within the Department of Justice and by the determinations of probable cause and necessity made by the judge on the basis of sworn affidavits whose accuracy and veracity is unchallenged.

This case also illustrates our point that it was within the Attorney General's power under Title III to delegate to his Executive Assistant—the senior official in his Office—the responsibility to act on proposed applications when the Attorney General was not personally available to act on them. The Attorney General entrusted this power to his Executive Assistant only after it had become clear from their working relationship that the Executive Assistant was fully familiar with the Attorney General's policies and decisions in these matters and would act in the same way he would have. In this case, the Executive Assistant acted only after the Attorney General himself had approved the first application, and he had even more information about the nature and scope of the smuggling operation before him than had the Attorney General—or the first district judge, for that matter—in concluding that there was a legitimate basis for seeking a wire interception.

These considerations show, we submit, why the rule of law would not be served by suppressing reliable and probative evidence of guilt in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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